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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

D.J., Respondent, v. C.C., Appellant.	A151996 (San Francisco County Super. Ct. No. FDV-17-813230)

D.J. sought a restraining order against his former wife, C.C., under the Domestic Violence Prevention Act (CVPA, Fam. Code, § 6200 et seq.), alleging that C.C. had harassed and abused him by posting humiliating details about him on the Internet.[1] D.J. used a Judicial Council form and checked the box with pre-printed language to request an order that C.C. not harass him or disturb his peace. He also checked the box for other orders that he drafted, including one prohibiting C.C. from posting any information about him or any reference to him on any Internet site.

After a hearing, the superior court found that C.C.'s conduct constituted abuse under the statute. The court issued a restraining order prohibiting C.C. from engaging in the conduct specified in the pre-printed form, but declined to issue the additional orders D.J. drafted.

[1] We previously granted D.J.'s unopposed request to use initials in referring to the parties. All statutory references are to the Family Code.

C.C. now appeals, arguing that her conduct did not constitute abuse under the DVPA, and that the restraining order violates her free speech rights. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *D.J.'s Petition*

In May 2017, D.J. filed a petition for a Domestic Violence Restraining Order alleging that C.C. had been harassing and abusing him since September 2016 by using her Facebook page to post details about his purported infidelity during the marriage, his sexual orientation, and his sexual practices. Although the posts did not refer to D.J. by name, it was obvious in context that C.C. was referring to him, as shown by the fact that two of D.J.'s children, and several friends and acquaintances saw the posts and asked D.J. about them. According to D.J.'s declaration, C.C.'s page and posts were "public," and the posts were widely disseminated, evidenced by the number of "likes" they received. D.J. alleged that the posts, which appeared about once a week, were damaging to his children, affected his mental health and his personal and professional relationships, and interfered with his business endeavors. He stated that he felt "abused, stressed, humiliated, and threatened."

The information that C.C. posted came from D.J.'s personal emails, which, D.J. claimed, C.C. accessed in May 2016 without his permission. Upon learning that C.C. intended to disclose information from those emails, he sought a court order preventing her from "disseminating, disclosing, describing, or otherwise revealing the content or existence of" his emails. In December 2016, the court denied this requested order as a prior restraint, and stated that it would not enjoin speech absent a judicial finding that the speech to be enjoined is unlawful.

Shortly thereafter, C.C. posted her status on Facebook as, "Gag request denied! The court hates bullies! I endured and im [*sic*] celebrating! I say freaks be gone!" A few days later, she posted that she had been at a bar where she met a former employee of a company, which company she identified by name. C.C. knew D.J. had also once worked at this company. She wrote on Facebook that she had an "[i]nteresting conversation" with this person, who she "only knew by name before." D.J. interpreted

the post as a threat to him professionally; he believed C.C. was implying that she discussed his personal life with a former colleague of his.[2]

D.J. claimed that over time, the vitriol in C.C.'s posts increased, and he was concerned about what C.C. was capable of doing to hurt him further. He argued that her conduct constituted abuse under the DVPA.

D.J. filed a Judicial Council form DV-100, Request for Domestic Violence Restraining Order, which includes check boxes for petitioners to identify the orders they seek. Some of the boxes are followed by specific language representing standard orders; there is also a check box to request "Other Orders," the text of which must be composed by the petitioner. D.J. checked the box asking for a standard "Personal Conduct Order[]," as pre-printed on the form, that C.C. be ordered "not to do the following things" to him: "Harass, attack, strike, threaten, assault (sexually or otherwise), hit, follow, stalk, molest, destroy personal property, disturb the peace, keep under surveillance, impersonate (on the Internet, electronically or otherwise), or block movements." He also checked the "Other Orders" box to request the following additional orders, which he specified in an attachment: "Respondent shall be prohibited from using, delivering, copying, or disclosing the messages or content of Petitioner's email messages, or anything else viewed from his personal e-mail accounts. Respondent shall not post any information about Petitioner or reference to Petitioner or any innuendo reasonably calculated to imply reference to Petitioner to any internet site nor cause any 3rd party to do the same and shall remove the same from any internet site over which she has access or control. [¶] Respondent shall permanently return [*sic*] all of Petitioner's emails in her possession, regardless of how obtained; and shall destroy all copies, electronic, paper, or otherwise."

B. *C.C.'s Response to the Petition*

C.C. filed a declaration in response, accusing D.J. of trying to prevent her from talking to her friends about the trauma she suffered through his actions during the

[2] At the hearing on D.J.'s petition, C.C. was asked whether she told the individual at the bar about D.J.'s supposed extramarital affairs, and responded, "No. He overheard it. I was talking to another person."

marriage. She claimed she had done nothing more than make posts "to [her] friends" on her Facebook page, which was under an account in her maiden name. She stated, "I have no idea why he or anyone he knows is even seeing my comments. I am not directing them to him or any one of his friends or professional contacts. Our last names are not the same on Facebook. I don't believe we have any friends in common any longer on Facebook. In order to be affected by my comments, [D.J.] has to go out of his way to find them. He has to login to Facebook using an account that is not his normal one or the alias I know about because I blocked those accounts, and then he has to go through all my posts about every random thing to find posts about him." C.C. admitted that her posts had been public. After D.J. filed his pending petition, she "increased [her] security settings so [her] posts are not public," and she removed from her friends list anyone who might be a friend of D.J.'s or an alias used by D.J.

C.C. objected to the additional orders that D.J. requested as vague and overbroad, and claimed that they would prevent her from using documents as a basis for discovery requests concerning community waste and from engaging in clearly protected speech, including "taking part in any free legal help online, any divorce or single mothers' support group or arguably posts regarding the parties' children (e.g., 'excited to have a free weekend while the kids are with their dad')."

C. *Hearing and Order*

A hearing on D.J.'s petition was held on June 21, 2017. The parties were the only witnesses.

1. *D.J.'s Testimony*

D.J. testified he learned about C.C.'s posts after July 2016, when he filed a previous request for a protective order, but before October 2016. At least five of his acquaintances and family members told him that C.C. was "saying some terrible things" about him and they thought D.J. should know about them. D.J. has four children in addition to those he has with C.C., and three of them (a 21-year-old, a 14-year-old, and a 10-year-old) separately asked him about things C.C. was saying about him on Facebook. Even though D.J. had no social media connection with C.C., he was able to see her posts,

which were "public," by logging onto Facebook with an account other than his main one. D.J. testified that the posts concerned "private, very intimate details that I believe should never be public if I don't want them to be public. Certain things were implied that aren't true. I believe [C.C.] jumped to conclusions about things that she found." The posts put a strain on his relationship with his children. Since the posts began, he felt stress and had been prescribed an anti-anxiety medication.

D.J. also testified that in late May 2017, when he and C.C. had been separated for over a year, they had an email exchange about one of their children, whose face was scraped while the child was playing at the home of D.J.'s girlfriend, Anita. D.J. testified that C.C. emailed, "Does Anita know you [engage in various specified sexual activities]." D.J. interpreted the email, which described the sexual activities explicitly and crudely, as a threat to inform his current girlfriend of the contents of his private emails.[3]

In early June 2017, after D.J. filed this petition for a restraining order, C.C. made two further posts referring to D.J.'s sexual activities and to his petition, which included taunting him about a "gag motion" and asking whether the court was "tired of you yet," clearly referring to D.J. D.J. found C.C.'s posts humiliating and harassing, and feared that if his request for a restraining order was denied, C.C. would become "emboldened" and "continue to seek out ways" to harm him. He conceded that as far as he knew, C.C. had not tagged him or the children in her posts, that her posts did not appear on his Facebook "feed," that C.C. had not directly contacted his employer or family members with the private documents or information she had obtained, and had not attached the documents to any court pleadings.

2. *C.C.'s Testimony*

C.C. testified about a March 2017 post in which she wrote, "My son . . . told me that he was told by [a little girl] that I referred to her mother named Anita as 'crazy.'

[3] At about the same time C.C. sent the email, she posted that her "ex" was "still out there fooling people targeting healthcare workers like nurses and doctors." C.C. testified she learned from one of her children with D.J. that Anita was in the medical profession.

[¶] . . . [¶] To this little girls mom, make sure you aren't being manipulated by a gay guy (if you don't know that yet too). I know, its hard, I have been fooled too." C.C. said that at the time she wrote it she did not know that Anita was D.J.'s girlfriend, and that she had learned that fact about 10 days before the hearing. C.C. also said that, although her post was "public," she did not intend it as notice directed to Anita; she was simply posting to her "small circle of friends." Her posts had been public because Facebook was how she communicated with a sister in Japan and with "a lot of friends" in the Philippines.

Asked whether her Facebook posts were in reference to D.J., C.C. responded, "I post things based on my experience. Whether you think that's in reference to him that's your interpretation. I post things based on my feelings and feelings for the day and whatever is happening to me that day. I post it. It's my freedom of speech."

C.C. admitted that in May 2017 she sent D.J. the email about Anita and D.J.'s sexual practices, and testified that over the course of the past year she may have sent him a second email that referred to similar topics and used similar language.

3. *Findings and Order*

The trial court judge found C.C.'s conduct amounted to abuse: "I think that looking at the totality of what the circumstances are here that it was reckless, to say the least, that the way you disseminated this information, your denials of how direct this was pertaining to [D.J.] himself are not credible. [¶] They do not align with not only the statements that you made yourself, but the responses that you got from your friends and family that clearly identified that they know who you're talking about. There appears to be no effort, really, aside from the fact that [D.J.'s] name was not specifically used, to hide who it is you're referring to. [¶] *Now, if that were it, if this was only about the Facebook, that would likely not be enough. But you went one step further which is very significant to this Court. You knew . . . or you had reason to believe by your own words that [D.J.] was aware of this and it almost seems like you . . . turned up the level of hatred that was displayed in your words and the level of kind of disparagement and then you directed it exactly to [D.J.]*. . . . [¶] Letting him know that not only did you have these feelings towards him, but that you wanted his current partner to know about that

and that you were available, and multiple references that have been admitted in evidence, you go out of your way to say that anyone else that needs more information about this or needs some help with this type of issue can somehow contact you to get that. [¶] *Now if [D.J.] had not been directly included in this, this may very well be a different issue. But [D.J.] was directly included in this. We have in evidence one email. You suggested there's at least one other email by your own testimony.* [¶] *And in looking at everything that's happened, including your reaction to [D.J.'s prior] request for order that was a plea for protection, that was not him using a sword against you. It was him asking that the court provide him with a shield from you. And that was denied by the court. But your reaction to that speaks volumes as to what has happened after this.* [¶] *And it makes it very reasonable, objectively reasonable, that [D.J.] would be highly worried about what you might do next if you're not stopped.* [¶] I find that [D.J.'s] concerns are objectively reasonable. I believe that any reasonable person in [D.J.'s] position where there's been an exposure of his private affairs in a reckless manner, apparently, and I'm finding this, that it's for the purpose of making him feel bad about his conduct, I'm finding that you did that for the purpose of hurting him. [¶] And it is very clear to me that your denials in this court to the contrary, including the question that I asked you about how you reconciled all of this information about Anita and healthcare, and then taking the witness stand under oath and pretending to say that somehow you weren't sure that these things actually fit, all of that is concerning to the Court and I can only imagine how concerning it is to [D.J.] [¶] It should not go unchecked. *I find it abusive.*" (Italics added.)

The trial court then discussed line by line the "Other Orders" that D.J. requested, and declined to enter any of them. The court concluded that the order prohibiting C.C. from using or disclosing anything she viewed from his personal email accounts was overbroad and would infringe upon C.C.'s rights to talk about things "in a way that is not designed to harass you, in a way that does not harass you." The court similarly concluded that the order prohibiting C.C. from posting any information about or reference to D.J. was overbroad. And the court declined to order C.C. to return D.J.'s emails, explaining, "There is a history here. There's been a divorce case. Many things

happened in that case. And it appears that the parties had access to each other's information. There was not a gag order. There was not a protective order issued by the court as to the use of information."

The court stated that C.C. was "prohibited from doing anything that would harass" D.J. and issued a five-year order of protection consisting of one of the standard personal conduct orders preprinted on Judicial Council form DV-130. The order states that C.C. must not do the following to D.J.: "[h]arass, attack, strike, threaten, assault . . ., hit, follow, stalk, molest, destroy personal property, disturb the peace, keep under surveillance, impersonate . . ., or block movements." The court also authorized D.J. to record communications by C.C. that violate the order.

C.C. timely appealed.

DISCUSSION

A. *Applicable Law*

The purpose of the DVPA is "to prevent acts of domestic violence, abuse, and sexual abuse and to provide for a separation of the persons involved in the domestic violence for a period sufficient to enable these persons to seek a resolution of the causes of the violence." (§ 6220.) The DVPA authorizes a trial court to issue an order "to restrain any person for the purpose specified in Section 6220 if [evidence] shows, to the satisfaction of the court, reasonable proof of a past act or acts of abuse." (§ 6300, subd. (a).) In particular, a court may issue an order "enjoining specific acts of abuse." (§ 6218, subd. (a).) "Abuse" includes "any behavior that has been or could be enjoined pursuant to Section 6320" (§ 6203, subd. (a)(4)), and "is not limited to the actual infliction of physical injury or assault." (§ 6203, subd. (b).)

Section 6320 by its terms authorizes the court to issue an order enjoining various types of conduct, including "harassing" and "disturbing the peace of the other party." (§ 6230, subd. (a).) The latter phrase has been interpreted to mean "conduct that destroys the mental or emotional calm of the other party." (*In re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483, 1497 (*Nadkarni*).) In *Nadkarni* the phrase was construed to

include "destroying the mental or emotional calm of [a former spouse] by accessing, reading and publicly disclosing her confidential emails." (*Id.* at p. 1498.)

"We review an order granting a protective order under the DVPA for abuse of discretion. (*Nadkarni, supra,* 173 Cal.App.4th at p. 1495.) In considering the evidence supporting such an order, 'the reviewing court must apply the "substantial evidence standard of review," meaning " 'whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted,' supporting the trial court's finding. [Citation.] 'We must accept as true all evidence . . . tending to establish the correctness of the trial court's findings . . ., resolving every conflict in favor of the judgment.' " [Citation.]' (*Burquet v. Brumbaugh* (2014) 223 Cal.App.4th 1140, 1143.)" (*In re Marriage of Evilsizor and Sweeney* (2015) 237 Cal.App.4th 1416, 1424 (*Evilsizor*).)

B. *C.C.'s Actions Constituted "Abuse" Under the DVPA*

The record before the trial court included substantial evidence to support a finding of abuse. C.C. made public Facebook posts that clearly referenced D.J. When C.C. learned that D.J. was aware of her posts and that he, initially unsuccessfully, sought a court order to restrain them, she "turned up the level of hatred . . . [and] disparagement," and then directed her words and conduct to D.J. himself. C.C.'s conduct—her public Facebook posts and her emails directed to D.J.—which caused strain in D.J.'s relationships with his children, and caused him anxiety, constituted a disturbance of his peace and abuse under the DVPA. The evidence that C.C. ratcheted up her conduct supports the trial court's finding that it was objectively reasonable that D.J. would be concerned about what C.C. would do if no order were issued.

C.C. argues on appeal that the trial court abused its discretion in issuing an order enjoining her from conduct for which D.J. had presented "no evidence." She argues that even if D.J. "felt harassed" when he learned about her Facebook posts and learned that she had found his emails, the evidence before the court "made it clear that [she] did not direct any conduct at [him]." (Italics omitted.) This argument is without merit, because the trial court found that C.C.'s Facebook posts were directed at D.J., not to mention C.C.'s May 2017 email, which C.C. admitted she sent directly to D.J.

C.C. also contends that because D.J. attached her posts to his declaration in support of his petition for a restraining order, he cannot claim that her "limited dissemination" of the posts was abuse. This argument, too, lacks merit. We question C.C.'s assumption that family court records are more easily accessible to the general public than are "public" posts on Facebook. In any event, C.C.'s dissemination of the posts was hardly "limited": they were accessible to anyone who used Facebook, and they had been viewed by D.J.'s family members and acquaintances. By the time D.J. attached the posts to his declaration C.C. had already made them "public."

C.C. argues that her conduct was not as bad as the conduct that justified injunctions in other cases, but none of those cases sets a lower limit for abusive conduct. For example, in *Nadkarni*, a former husband obtained confidential emails of his former wife without her authorization and attached copies of some of them to a declaration he filed in support of a motion concerning child custody and support. (*Nadkarni*, *supra*, 173 Cal.App.4th at pp. 1488-1489.) Husband stated in his declaration that the emails " 'could be considered inflammatory and sensitive to certain others,' " and added that he had " 'no intention to share these emails other than as evidence in future legal proceedings.' " (*Id.* at p. 1489.) Wife interpreted his statements as a threat that unless she agreed to his demands in a pending case, husband would use the emails or information in them to embarrass her, injure her business relationships, and injure her relationships with family members and others. (*Id.* at p. 1490.) Wife further claimed husband had used information from her emails to find out what social events she would be attending, and that his knowledge of her attendance at events made her fear for her safety in light of his physically abusing her during the marriage. (*Ibid.*) The Court of Appeal ruled that wife's allegations sufficed for a showing of abuse under the DVPA, explaining that husband's "conduct with respect to [wife's] email account . . . allegedly caused the destruction of her mental or emotional calm and could, if found to be true, constitute 'disturbing the peace of the other party.' (§ 6320.)" (*Id.* at p. 1499.) Relying in part on its conclusion that the DVPA is to be broadly construed in order to accomplish its purposes, *Nadkarni* held that for purposes of section 6320 " 'disturbing the peace' " (and

therefore "abuse" as defined in § 6203) can include a former spouse's conduct in "accessing, reading and publicly disclosing" the other spouse's confidential emails. (*Id.* at p. 1498.)

C.C. argues that because there was no history of domestic violence in her case, *Nadkarni* is distinguishable. But the holding of *Nadkarni* does not depend upon the existence of a history of domestic violence by the party disseminating the private information. (See *Evilsizor, supra*, 237 Cal.App.4th at p. 1425 [discussing *Nadkarni* and noting that "[a]lthough a lack of past physical abuse may be considered by a trial court in considering a protective order, the DVPA's definition of abuse 'is not confined to physical abuse but specifies a multitude of behaviors which does not involve any physical injury or assaultive acts' "].) C.C. also argues that *Nadkarni* is inapplicable because, "excluding public Facebook postings," C.C. never directly contacted D.J.'s family members with any of the documents or information that she received during the separation and divorce, and thus did not disclose the emails to anyone. *Nadkarni* does not stand for the proposition that the public disclosure of a confidential email requires that the actual text of the email be provided to a third party. To the contrary, it is enough for confidential information taken from those emails to be publicly disseminated. (See *Evilsizor, supra*, at pp. 1421, 1425, 1433 [affirming order issued under DVPA enjoining disclosure or threats of disclosure of information obtained from other].) C.C. does not dispute that the information about D.J. in her Facebook posts derived from the confidential emails that she accessed without his permission, and she concedes that the posts were accessible to the public.

C. *The Restraining Order Is Not an Unconstitutional Prior Restraint*

C.C. contends that the trial court erred in issuing an order that was intended to prevent her from exercising her free speech rights and that represents an unconstitutional prior restraint of her free speech rights. We disagree with her characterization of the trial court's order.

The trial court's order, which prevents C.C. from harassing D.J., was not aimed at C.C.'s speech: it was aimed at her abusive and harassing conduct, as found by the court

after a hearing, and only incidentally affected her speech. Furthermore, the trial court explicitly *declined* to order the broad constraints on C.C.'s speech that D.J. requested, which would have prevented C.C. from making any use at all of information she gleaned from his emails, and from making any reference to him on the Internet. Thus, the very relief that C.C. claims would be problematic was not ordered by the court: the trial court did not prohibit C.C. from posting on Facebook or elsewhere, or prevent her from talking to her friends, or seeking counseling, or joining an online support group, or hinder her ability to recover some undisclosed asset. The trial court was explicit that its order did not prevent C.C. from talking about D.J., so long as she did it in a way that did not harass him. As the trial court explained, C.C. had no right to use her free speech rights in an abusive fashion, which the court found she had done.[4] The "ability to continue to engage in activity that has been determined after a hearing to constitute abuse is not the type of 'speech' afforded constitutional protection." (*Evilsizor*, *supra*, 237 Cal.App.4th at p. 1427; see also *Planned Parenthood Golden Gate v. Garibaldi* (2003) 107 Cal.App.4th 345, 352 [an injunction may " 'deprive the enjoined parties of rights others enjoy precisely because the enjoined parties have abused those rights in the past' "].)

C.C. contends that the trial court's refusal to make orders that specifically identify the conduct that would constitute future harassment is evidence that the court's order is overbroad. We disagree. The trial court explained: "I'm declining to make orders that are going to somehow specifically try to capture what type of harassment [C.C.] might do in the future. I believe one is vague and impossible to do that at this time prospectively." C.C. cites no authority to suggest that the court should have attempted to predict the types of harassing behavior in which C.C. might engage.

[4] C.C. argues that her posts simply "express her fury at [D.J.'s] betrayal of their marriage vows and disgust at the manner in which he did so. The posts contained true information." This argument is not supported by the record. The only evidence she cites that bears on the truth of her posts is D.J.'s offer during the divorce proceedings to stipulate that his "purchases/expenditures on his extramarital activities" totaled no more than $500. The trial court made no finding as to the truth of the information posted.

In sum, we conclude that C.C. has not shown that the trial court abused its discretion in issuing the restraining order against her.

DISPOSITION

The order appealed from is affirmed. D.J. shall recover his costs on appeal.

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Miller, J.

We concur:

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Kline, P.J.

_____
Stewart, J.

A151996, *D.J. v. C.C.*